

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
SMOKE SHOP II & IV, INC.)	Permit No. DL46-21320
d/b/a LAPORTE MINI-MART)	
LAPORTE, INDIANA)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Applicant, Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart (“Applicant”), located at 10502 North State Road 39, LaPorte, Indiana 46350, permit number DL46-21320, is the Applicant for a type 116 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application was assigned to the Alcoholic Beverage Board of LaPorte County (“Local Board” or “LB”). The Local Board held hearings on November 4, 2004 and March 3, 2005 and voted 3-1 to deny the application. The Commission adopted the Local Board’s recommendation.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission file (“ATC File”), now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individual testified before the Local Board in favor of the Applicant in this cause:
1. Gary Tapley, owner of Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart.
- B. The following individuals testified before the Local Board against the Applicant in this cause:
1. Tren Bradford;
 2. Rick Bradford;
 3. Hugh Smith;
 4. Michelle Bonnick;
 5. Elana Murzinski;
 6. Paul Murzinski; and
 7. Jack Arnett.
- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Exhibit 1, the Applicant's Local Board Presentation Brochure, which contained following items:
 - a. factors to consider in approving an application for a new permit;
 - b. saleable grocery items;
 - c. residential rule chart;
 - d. photographs of the proposed permit premises;
 - e. petitions in favor of the issuance of a type-116 beer & Wine dealer to the Applicant at the proposed permit premises;
 - f. photographs of the proposed permit premises subsequent to hearing on November 4, 2004 (photographs depicting remodeling, devoted floor space and inventory);
 - g. current customer count, sales and devoted linear feet data;
 - h. customer count;
 - i. sales data; and
 - j. devoted linear feet.
 2. ATC Findings and Orders regarding grocery permits in LaPorte County, Indiana:
 - a. Letter from Executive Secretary Daniel M. Steiner to Local Board Members (March 1, 1991);
 - b. *Gas City, Ltd. v. Indiana Alcohol & Tobacco Commission* (December 30, 2002); and
 - c. *Casey's Enterprises, LLC v. Indiana Alcohol & Tobacco Commission* (January 4, 2005.)

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

None.

III. EVIDENCE BEFORE THE ATC

- A. The following individual testified before the ATC in favor of the Applicant in this cause:

1. Gary D. Tapley, owner of Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart;
2. Mark Webb, former Executive Secretary and Hearing Judge of ATC.

- B. The following individuals testified before the ATC against the Applicant in this cause:

None.

- C. The following evidence was introduced and admitted before the ATC in favor of the Applicant in this cause:

None.

- D. The following evidence was introduced and admitted before the ATC against the Applicant in this cause:

None.

IV. FINDINGS OF FACT

1. The Applicant, Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart, 10502 North State Road 39, LaPorte, Indiana 46350, permit number DL46-21320, is the applicant for a type 116 ATC permit. (ATC File).
2. Applicant sells milk and other dairy products, soup, bread, eggs, cereal, soda, snacks, sandwiches, cookies, pizza, ice cream, candy, donuts, frozen foods, oil, sauces and spices, processed meat and other items customarily found in a grocery store (LB Hearing; ATC Hearing).
3. Applicant devotes 70% of its total floor space to food and grocery items, and 30% of its total floor space to tobacco and miscellaneous items. (LB Hearing; ATC Hearing).

4. A substantial portion of the business carried on or to be carried on at the proposed permit premises is in the nature of the Applicant's main business function and the Applicant satisfies the "character of business" test. (LB Hearing; ATC Hearing; Ind. Code § 7.1-3-1-19).
5. There is a need for the services of the Applicant at the proposed permit premises. (LB Hearing; ATC Hearing).
6. Applicant submitted a petition containing over 700 signatures of people in favor of the issuance of a permit at the proposed permit premises, evidencing a desire to receive the services of the Applicant at the proposed permit premises. (LB hearing; ATC hearing).
7. The services of the Applicant at the proposed permit premises would have a positive impact on other businesses in the neighborhood or community in which the proposed permit premises is located. (LB Hearing; ATC Hearing; 905 IAC 1-27-4(c)).
8. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. (LB hearing; ATC hearing; 905 IAC 1-27-4(d)).
9. The proposed permit premises does not violate Ind. Code § 7.1-3-21-11 and is located more than 200 feet from a church or school. (ATC Hearing).
10. The proposed permit premises are not in a residential district as referred to in Ind. Code § 7.1-1-3-8, Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (LB Hearing; ATC Hearing).
11. Applicant owns a store similar to the proposed permit premises that was granted alcoholic beverage permit #DL71-21215 by the St. Joseph County, Indiana Local Board on October 16, 2005. (LB Hearing).

12. The testimony of the remonstrators opposing the Applicant was more in the nature of general opposition to the retail sale of alcohol and cigarettes than any specific objection to the grant of a permit to the Applicant. (LB Hearing; ATC Hearing).

13. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Applicant, Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart, 10502 North State Road 39, LaPorte, Indiana 46350, permit number DL46-21320, is the applicant for a type 116 ATC permit. (ATC File).

2. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

3. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

4. The Commission is authorized to act upon proper application. *Id.*

5. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

6. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

8. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.
9. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).
10. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.
11. The proposed permit premises are more than 200 feet from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.
12. There exists on the ATC's quota for unincorporated LaPorte County, Indiana, an opening for a Type-116 beer and wine grocery permit. Ind. Code § 7.1-3-22-4. (ATC records).
13. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.
14. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
15. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*
16. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
17. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

18. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
19. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
20. Where Remonstrators show that they are against issuance of alcoholic beverage permit at this particular location, such evidence constitutes a desire to not receive such services at that location. 905 IAC 1-27-4(b).
21. There is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).
22. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
23. The beer and wine permit at the Applicant's location will positively impact other businesses in the neighborhood and community. 905 IAC 1-27-4 (c).
24. The ATC may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the ATC that a substantial portion of the business carried on at the permit premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).
25. The Commission may issue a beer and wine grocery permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19. *Id.*

26. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. See *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 839 (Ind. App. 1982).
27. The term "grocery store", in common usage, means a building or structure where groceries are kept for sale. *Goldstein v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).
28. The word "substantial", as used in Ind. Code § 7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).
29. The phrase "in the premises", as used in Ind. Code § 7.1-3-1-19, means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.
30. Where an applicant carries and sells a large number of non-taxable grocery items as well as ordinary household products and miscellaneous items not inconsistent with the sales of a typical grocery store, such sales are substantial within the meaning of the "character of business" test. Ind. Code § 7.1-3-1-19.
31. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a grocery store. (LB Hearing and ATC Hearing).
32. The Applicant has submitted substantial evidence that it meets the "character of business" test for a grocery store and is qualified to hold an ATC Type-116 beer and wine grocery permit. (LB Hearing and ATC Hearing).

33. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).
34. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.
35. The LB denied this application without sufficient evidence that would support a finding that this permit should not be issued. (LB Hearing).
36. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.
37. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*
38. The Applicant has submitted substantial evidence that it is qualified to hold an ATC Type-116 grocery beer and wine permit; there is virtually no support of the general population in the area against the issuance of this permit; there is substantial evidence of support of this permit by the general population in the area who frequent and who are in favor of the issuance of this permit; and, the evidence is with the Applicant and against the remonstrators. (LB Hearing and ATC Hearing).
39. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority,

limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence.

40. The LB's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

41. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the LB to recommend denial of the new permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. And it is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the recommendation of the LB. The appeal of Applicant, Smoke Shop II & IV, Inc., d/b/a LaPorte Mini-Mart, 10502 North State Road 39, LaPorte, Indiana 46350 for the application of this Type 116 permit, #DL46-21320 is approved, the recommendation of the LB in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATED: _____

U-Jung Choe, Hearing Judge